In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-307

ROBERT EDWIN BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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THE GOVERNMENT MISREPRESENTS PETITIONER'S ARGUMENT THAT RETROACTIVE APPLICATION OF JUDICIAL INTERPRETATIONS HOLDING LAND SALE CONTRACTS TO CONSTITUTE SECURITIES VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND FAILS TO DEMONSTRATE WHY THIS COURT IS PRECLUDED FROM HEARING THE IMPORTANT CONSTITUTIONAL ISSUE WHICH PETITIONER PRESENTS.

The Government erroneously characterizes Petitioner's due process argument as claiming that "due process was denied when the trial court determined that the land sale contracts [for which sale Petitioner was convicted] were 'securities.'" [Brief in Opp. 3] Petitioner, however, was denied due process not when the trial court determined that the land sale contracts forming the basis of his indictment were securities, but when that court applied its determination retroactively to convict Petitioner of acts which occurred prior to a decision by any court of the United States that land sale contracts constituted securities. While the Government is correct in asserting that the principle that an investment contract constitutes a security was established by the Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), it flagrantly mischaracterizes *Howey* as definitively holding land sale contracts to be securities. To the contrary, the Court specifically stated that "[t]he legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract *together* constitutes an 'investment contract' within the meaning of § 2(1)." 328 U.S. at 297 (emphasis supplied). The Court clearly did not address the question of whether a land sale contract, without more, constituted a security. It was not until 1972, after the acts for which Petitioner was convicted had occurred, that any court held land sale contracts to be securities. *SEC v. Lake Havasu Estates*, 340 F. Supp. 1318 (D. Minn. 1972). Indeed, as late as 1975, the Tenth Circuit in *McCown v. Heidler*, 527 F.2d 204, 208 (10th Cir. 1975), stated that "a land purchase contract ... does not fall automatically within the

confines of the Securities Acts."[1] By retroactively applying post-conduct judicial decisions in order to sustain Petitioner's conviction, the Ninth Circuit violated Petitioner's due process rights just as clearly as did the Sixth Circuit in *Marks v. United States*, 430 U.S. 188 (1977), when that court retroactively applied a definition of obscenity which differed from that established by judicial decisions at the time of the defendants' conduct.[1]

The Court's review of Petitioner's due process contention is particularly important in view of the pendency before the Court of a closely related issue in *International Brotherhood of Teamsters v. Daniel*, 561 F.2d 1223 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3526 (U.S. Feb. 21, 1978) (Nos. 77-753 and 77-754): Whether the Court's determination of the status of non-contributory pension plans as securities should be given retroactive application. *See* Appendix attached hereto. While the Court's determination of the issue of retroactivity in *Daniel* will determine only the right of a plantiff to monetary relief, the decision will have criminal ramifications far beyond the narrow civil context in which it will be rendered. Petitioner's case directly poses the question of the extent to which a judicial determination with respect to the status of a

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[1] The Government's citation of SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) (sale of assignments of oil leases), and Los Angeles Trust Deed & Mortgage Exchange v. SEC, 285 F.2d 162 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961) (sale of promissory notes secured by a mortgage on real property), are equally misleading. Neither decision considered whether land sale contracts were "securities."

"security" may constitutionally be given retroactive application and, therefore, should be considered by the Court.

Contrary to the Government's conclusory argument that Petitioner has not properly presented the issue of due process, Petitioner squarely presented the issue of his lack of knowledge, and hence lack of notice, before both the trial and appellate courts. [RT 1064; App. 32a] His failure to "specifically urge" the courts below to consider whether his due process rights were violated by retroactive application of judicial determinations that land sale contracts were "securities" should not, in the interest of fundamental justice, preclude this Court's consideration of his constitutional claim.[2]

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[2] The Court in Hormel v. Helvering, 312 U.S. 552 (1941), established that technical procedural infirmities should not be used to preclude appellate consideration of important issues of which all parties were apprised during the course of litigation. Significantly, it said:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557. The purpose for precluding consideration of issues on appeal which were not presented to courts below is to assure that "litigants . . . not be surprised on appeal by final decision of issues upon which they have had no opportunity to introduce evidence." *Id.* at 556. Here, however, the general procedural rule cited by the Government clearly has no application.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 23, 1978.

Appendix follows

APPENDIX

Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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2. *Prospective application.*

In the event that this Court determines that employee interests in involuntary, non-contributory pension plans are protected by Section 10(b), 15 U.S.C. 78j(b), and Rule 10b-5, any liability should be imposed only prospectively, for the reasons recently stated by this Court in *City of Los Angeles, Department of Water and Power* v. *Manhart*, No. 76-1810, decided April 25, 1978. In *Manhart*, the Court recognized that (slip op. 18):

> The occurrence of major unforeseen contingencies * * * jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

We have argued in point I of this brief that Congress has not authorized a cause of action under the Securities Acts in the circumstances of this case. While that conclusion is subject to argument, we see no basis for arguing that Congress has "plainly commanded" retroactive liability in these circumstances under the Securities Acts. Any finding of liability would be a "marked departure from past practice," resulting in "devastating" liability which would be borne "in large part [by] innocent third parties" (*id.* at 19). We recognize that a damage remedy under the anti-fraud provisions, like the award of backpay at issue in

Manhart, should ordinarily not be withheld. Because of the peculiar problems of retroactive liability in the pension plan context, however, here as in *Manhart* liability, if imposed at all, should be entirely prospective, making actionable under the securities laws only those misrepresentations that occur after the announcement of this Court's decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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